



**Centre for the Study of Violence and Reconciliation**

**Submission to  
The Portfolio Committee on Justice and Constitutional  
Development**

**Re: Criminal Procedure Amendment Bill, 39 of 2010**

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*'The most serious act in which a police officer can engage is the use of deadly force. The power to carry and use firearms in the course of public service is an awesome responsibility'.<sup>1</sup>*

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## **Introduction to the Centre for the Study of Violence and Reconciliation**

1. The Centre for the Study of Violence and Reconciliation (CSVr) is an independent, non-profit organisation founded in 1989. The primary goals of CSVr are to contribute to the building of violence-free societies and to promote sustainable peace and reconciliation in South Africa, across the African continent and globally. In addition to staff involved in managerial and administrative functions CSVr includes researchers, community facilitators, psychologists and social workers. The primary goal of the CSVr is to use its expertise in building reconciliation, democracy and a human rights culture and in preventing violence in South African and in other countries in Africa. CSVr has a website [www.csvr.org.za](http://www.csvr.org.za) which provides information about the organisation and free access to CSVr publications.
2. CSVr has worked for many years to support democratic police transformation in South Africa. In particular CSVr has been extensively involved in work related to the use of force by police. This has been part of its work aimed at promoting democratic criminal justice, namely criminal justice which is responsive to the people of South Africa and which conforms to the norms of the Constitution. CSVr's work on these issues goes back to the early 1990s and includes in depth engagements in the policing and correctional and other arenas.
3. CSVr welcomes this opportunity to provide a submission to the Portfolio Committee on the proposed amendment to section 49 of the *Criminal Procedure Act 1977 ('the Act')* by the *Criminal Procedure Amendment Bill 2010 ('the Amendment Bill')* and thanks the committee for allowing an extension on the date for submission.
4. CSVr would like to request that it be provided with an opportunity to provide an oral submission to the Justice Portfolio Committee on this submission and its recommendations.

## **Summary**

5. This submission motivates that:
  - a. The bill in its current form would lead to an expansion of police powers to use deadly force.
  - b. As a result the amendment is likely to add to the problem of excessive use of deadly force by police;
  - c. Expanding police powers to use deadly force will not improve police safety.
  - d. The powers in question are of a unique and exceptional nature and need to be regarded as of the utmost gravity.
  - e. The exercise of these powers should be governed by a 'Protection of life principle' (also called a 'dangerousness' principle).
  - f. The current Section 49 embodies this principle but suffers from a lack of clarity. There is therefore a need to amend the current Section 49 in order to enhance its clarity.
6. The submission puts forward specific wording for strengthening the Bill to address these concerns in relation to:
  - a. The dangerousness of the suspect (incorporation of a protection of life principle);
  - b. The safety of civilians;
  - c. Restricting the power to use deadly force for arrest to 'peace officers' including police and correctional officials.
7. The submission argues that the Bill cannot be relied on to resolve problems with the use of force. Key steps to be taken by the police and parliament in order to support police and public safety, and the

effectiveness of the police through the professional use of force, are outlined.

8. In conclusion the submission motivates that the emphasis of policing policy needs to be on developing a style of policing which will optimise public cooperation with the police. To this end professional use of force needs to be complemented by an emphasis on respectful and fair policing.

**9. Key proposals put forward in this submission are that:**

- a. Subsection 49(2)(b) of the bill should be amended to provide that:

*The arrestor may use deadly force only if s/he has reasonably grounds to believe that:*

- i. The suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm; and*
- ii. The suspect is likely to inflict serious bodily harm in the future if not apprehended; and*
- iii. There are no other reasonable means of effecting the arrest, whether at that time or later; and*
- iv. The use of deadly force will not endanger innocent bystanders.*
- v. For the purpose of section 49(2)(b)(ii) persons may be regarded as likely to inflict serious bodily harm in the future if the suspect is reasonably believed to have committed:*
  - 1. Multiple acts of this kind; or*
  - 2. Aggravated robbery with a weapon capable of inflicting serious injury; or*
  - 3. Rape involving the infliction or threatened infliction of injury with a weapon capable of inflicting serious injury; or*
  - 4. On other reasonable grounds.*

- b. The definition of arrestor in Section 49(1)(a) of the draft bill should be changed to restrict the use of deadly force for arrest to 'peace officers' including police and correctional officials.
- c. In order to support greater police and public safety there should be an emphasis on professional use of force by police. Measures which it is proposed will assist in this regard include that parliament should request that the SAPS and metro police agencies:
  - i. Establish systems for monitoring the use of force.
  - ii. Develop use of force policies which provide guidance to their members on the use of force.
  - iii. Review and upgrade their current approaches to providing support to their members to ensure professional use of force.

## Submission

### **Bill expands police powers to use deadly force**

10. The Amendment Bill is based on the belief that legislation will pass Constitutional muster if it is compatible with paragraph 54(h) of the judgment of the Constitutional Court in *S v Walters*.<sup>2</sup> This provides authority for the police (and civilians) in South Africa to use deadly force to arrest a suspect who

*'is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily harm [where] there are no other reasonable means of carrying out the arrest, whether at that time or later. (emphasis added)*

11. In international legislation and policies relating to the use of deadly force by police there are three types of standards which are compatible (in the sense that they fall within or do not conflict) with the framework put forward in paragraph 54(h):

- a. **An immediate of imminent danger standard ('defence standard')** – restricts the use of deadly force to situations where there is an *immediate or imminent threat* of serious bodily harm to the police officer or another person. See for instance the deadly force policies of the New York Police Department and Metropolitan Police Department (Washington) in the US.
- b. **A dangerousness standard (also in this submission called a 'Protection of life principle')** – deadly force may only be used against a person who is likely to cause death or serious bodily harm to the police officer or another person in the immediate situation (use of deadly force for defence) or in the future (use of deadly force for arrest). For instance, in addition to providing that police officers may use deadly force against an imminent threat of death

or serious bodily harm the Los Angeles Police Department policy on deadly force provides that police officers are authorized to use deadly force to

*Prevent the escape of a violent fleeing felon when there is probable cause to believe the escape will pose a significant threat of death or serious bodily injury to the officer or others if apprehension is delayed. In this circumstance, officers shall, to the extent practical, avoid using deadly force that might subject innocent bystanders or hostages to possible death or injury. (emphasis added)*<sup>3</sup>

- c. **A serious violent offence standard** - in addition to defence deadly force may be used against a person who has committed a serious violent offence. This is the principle embodied in paragraph 54(h) of the Walters judgment and in the Amendment Bill.

12. The Act as it currently stands articulates a **dangerousness standard** though it suffers from a lack of clarity in the manner in which it has been drafted. A provision which articulates a dangerousness standard more clearly would be one which provides that:

Police officers may only use deadly force to stop a fleeing suspect if they have reasonable grounds to believe that the suspect (1) has committed an offence involving the actual or threatened infliction of serious physical injury or death, and (2) is likely to endanger human life or cause serious injury to another unless apprehended without delay.<sup>4</sup>

13. Therefore:

- a. *A serious violent offence standard – is based on what the suspect is believed to have done in the past.*
- b. *A dangerousness standard imposes a further condition in relation to the use of deadly force for arrest. The suspect must not only be*

reasonably suspected of having committed a serious violent offence *but also* be likely to pose a danger of serious harm in the future.

14. The Bill in its current form therefore reduces the restrictions on the use of deadly force allowing police (and civilians) wider powers to use deadly force than are authorised by the Act in its current form.

**If enacted Bill in its current form will exacerbate problem of excessive force**

15. Over the past two years there have been a number of incidents which have contributed to concern about the use of deadly force by the SAPS. These have included:

- a. The killing of Olga Kekana in Pretoria on 11 October 2009.<sup>5</sup>
- b. The killing of three year old Atlegang Phalane in Klipfontein View near Johannesburg on 7 November 2009.<sup>6</sup>
- c. The killing of fifteen year old Kwazi Ndlovu near Empangeni on 31 March 2010<sup>7</sup>
- d. The killing of Andries Tatane in Meqheleng outside Ficksburg on 13 April 2011.
- e. The killing of Jeanette Odendaal by a police officer outside Kempton Park police station on 26 April.

16. The latest ICD statistics also indicate that killings by police in shooting incidents have escalate dramatically in recent years. Over the last two years they have been at their highest levels recorded since the ICD started operating in 1997.<sup>8</sup>

**Table 1: Persons shot dead by police over last five years (ICD statistics)**

	2005-2006	2006-2007	2007-2008	2008-	2009-2010
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				2009	
National	282	375	420	568	524

17. Killings over recent years have also included a significant number of innocent bystanders

**Table 2: Innocent bystanders shot dead by police over last five years (ICD statistics)**

	2005-2006	2006-2007	2007-2008	2008-2009	2009-2010	Total
Innocent bystanders shot dead by police						
National	10	4	3	32	16	65

18. These figures, together with figures on complaints of serious non-fatal violence by police, which according to ICD statistics have increased dramatically in recent years, suggest strongly that there is a problem of the control of the use of deadly force by police in South Africa and that the SAPS is currently not exercising proper control over the use of lethal and other force by its members. In this context it would be ill-advised to expand police powers to use lethal force. This will send a signal to police that they should use greater levels of force and exacerbate the problem of excessive force.

## **Bill does not enhance police safety**

19. Expanding police powers to use deadly force will also not improve police safety by enhancing their ability to defend themselves. The right to use force for self defence or to protect another person is embodied in common law principles. The amendment to the law will not give police greater power to defend themselves. The law as it currently stands provides them with adequate powers in this regard.

20. Evidence from the US suggests that expanding police powers may reinforce rather than helping to address the problem of killings of police. Where steps have been taken to limit police powers to use deadly force for arrest this has not negatively impacted on police safety. The types of measures which are most likely to assist with improving police safety are measures which improve the overall professionalism of police in using force (discussed in more detail in paragraphs 43-45 on pages 22-24 below). In the US these types of measures have contributed to reductions in killings both of police and by police.

## **Deadly force has implications which are of the most serious kind**

21. Section 49 of the Criminal Procedure Act deals with the use of force by police and specifically the issue of lethal or deadly force. Deadly force is of special concern for a number of reasons:

*Deadly force is force which has the potential to cause death*

- a. The term deadly force is usually used to refer to the use of firearms but more generally refers to force which potentially may cause death. Deadly force has consequences of the most extreme kind which include not only death but also serious injury and disability.

*The effects of deadly force are irreversible*

- b. The consequences of the use of deadly force are not only of the most serious kind but frequently irreversible. In this respect the use of deadly force is in a unique category. Other decisions taken by police can be reviewed and reversed where they are found to be unjustified.

*There is a high potential for error*

- c. Decisions relating to the use of deadly force are often taken quickly. Related to this there is a high potential for them to be taken in error. For instance Olga Kekana was killed by police who wrongly identified the vehicle in which she was travelling as a hijacked vehicle.

*Deadly force impacts on bystanders*

- d. The risks to innocent people do not only involve people who are mistakenly identified as criminal suspects but also bystanders. ICD statistics indicate for instance that 3% of people killed by police in shooting incidents in the years 2005/06-2009/10 (65 out of 2169) were innocent bystanders.<sup>9</sup>

*Deadly force has implications for public attitudes to police*

- e. The use of lethal (and other) force by police also has profound implications for the image of the police. The image and public reputation of a police service may be profoundly shaped by a single incident where lethal or other force is used. In some cases the misuse of force gives rise to public instability. The way in which police use force therefore has profound implications for public attitudes to and trust in the police. Public attitudes to police determine levels of public cooperation with the police and therefore have a major influence on the effectiveness of the police. If

members of the public know that police use of deadly force is based on clear ethical principles this will contribute to public respect for the police and ultimately police effectiveness.

*Using deadly force has serious implications for police officers*

- f. The use of deadly force also of course has profound implications for police officers themselves. Police officers who use deadly force face profound personal consequences including not only trauma but also self doubt about the morality of their actions.<sup>10</sup> In the interests of police themselves it is important that the provisions which empower them to take life be based on clearly understood ethical principles. In asking police to be prepared to take life the state has a responsibility to clearly articulate to them the ethical principles which authorize them to do so. The absence of clearly articulated principles feeds into a lack of clarity about the ethical basis for the use of deadly force. This in turn feeds into the sense of police as a morally compromised and tainted profession who are mere functionaries of the state in enforcement of the law. If policing itself is not based on valuing and protecting human life this feeds into the overall problem of lack of value for human life in society. Basing the use of deadly force on clear ethical principles also has profound internal benefits for police agencies, providing moral reassurance to police officers who are involved in the use of deadly force, as well as feeding into feelings of pride in the policing profession and *esprit de corps*.

**Protection of life ('dangerousness') principle**

22. For the reasons outlined above, not least the interests of police officers who are responsible for using deadly force, it is important that the use of deadly force by police be based on clear and defensible ethical principles.

23. The principle which is most appropriate here is a protection of life (or protection of the person) principle. A protection of life principle allows for the use of deadly force for defence against an immediate or imminent threat of death or serious bodily harm but is broader than this. Where a person who is likely to harm others is fleeing from police and there is no other way of apprehending him or her a protection of life principle provides a basis for the use of deadly force for arrest. Essentially it means that deadly force should only be used against a person who is likely to cause death or serious bodily harm to the police officer or another person in the immediate situation (use of deadly force for defence) or in the future (use of deadly force for arrest). Implicitly this would only be appropriate where deadly force is the only means available to prevent this from happening.
24. A protection of life principle best conforms to principles of proportionality and necessity. It justifies the taking of human life only where this is necessary to protect people against death or serious injury.
25. A protection of life principle can be seen as the key principle in international legal instruments which directly address the use of deadly force by police including the Code of Conduct for Law Enforcement Officials<sup>11</sup> (1979) and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).<sup>12</sup>
26. Some police departments in the United States use this principle in their policies on the use of deadly force. (See for instance the policy of the Los Angeles Police Department quoted in paragraph 11.b on pages 8-9).
27. A protection of life principle is embodied in the current Section 49 though as indicated above (paragraph 12 on page 9) the current law is not clearly drafted.
28. The dangerousness of the suspect is also emphasised in paragraph 54(f) of the Constitutional Court's judgment in the Walters case which states

that 'In deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account, *including the threat of violence the suspect poses to the arrestor or others*, and the nature and circumstances of the offence the suspect is suspected of having committed; the force being proportional in all these circumstances (emphasis added).' It may be argued that the Department of Justice memorandum accompanying the Amendment Bill is selective in its emphasis on the principles contained in paragraph 54(h) and should give more attention to the principles contained in paragraph 54(g).

#### *The reasoning of the US Supreme Court in Tennessee v Garner*

29. The judgment of the US Supreme Court in *Tennessee v Garner*<sup>13</sup> is cited by both the Supreme Court of Appeal in the case of *Govender v Minister of Safety and Security*<sup>14</sup> and by the Constitutional Court in *S v Walters*<sup>15</sup>. The key passage from the US Supreme Court judgment which is quoted in full in both *Govender* and *Walters*, and can therefore be seen as providing the basis for the position taken by both courts on this issue, reads as follows:

'Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting from failing to apprehend him does not justify the use of deadly force to do so ... *Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force*. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been give.' (emphasis added)

30. The key principle for the use of force which is articulated in this passage is reflected in the words '*Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force.*' The essential test which is put forward by the US Supreme Court in this passage is therefore one of the dangerousness of the suspect. There is no justification for using deadly force where a suspect poses no immediate threat to the police officer and no (implicitly immediate or future) danger to others. The justification for using deadly force to prevent the escape of the suspect is where the suspect poses a threat of serious physical harm to the police officer or others.
31. The US Supreme Court however then continues to argue that 'Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been give.' The court thus suggests that the fact that a suspect is believed to have inflicted a crime involving serious violence can be seen as a test of whether they pose a threat of serious physical harm to others.

*Involvement in serious violence not in itself proof of dangerousness*

32. However the fact that a person is reasonably believed to have committed a crime of serious violence cannot on its own be taken to justify the conclusion that the person poses a threat to others. While this is frequently true it is not on its own a sufficient basis to reach this conclusion. For instance many of those who engage in premeditated acts of violence such as robberies do so on a continuing basis. In general it may be said that people who carry out robberies with weapons such as guns or knives are likely to pose a danger to others in the future. But with some perpetrators the acts of violence which they engage in are to a

large degree an exception and they do not engage in serious violence on a habitual basis.<sup>16</sup>

33. Some people if they escape successfully are likely to harm others.

However the fact that a person has committed a crime involving serious violence does not in itself provide evidence that they are will do so again and therefore does not on its own justify the use of deadly force in terms of a protection of life principle.

### **The need for clarity**

34. The principle objection to a protection of life principle is that it does not provide sufficient clarity to police as to which suspects should or should not be regarded as presenting a future danger of death or serious bodily harm. It may be argued that, while the law should embody high principles, these should nevertheless be expressed in concrete terms and that the formulation contained in the Bill (the suspect is suspected on reasonable grounds of having committed a crime involving the infliction or threatened infliction of serious bodily) is therefore preferable as it enables explicit instructions to be given to police as to when they may and may not shoot. This has been the principle reason advanced by the SAPS as to why Section 49 needs to be amended and based on the formulation articulated in paragraph 54(h) of the Walters judgment.<sup>17</sup> The concern with clarity needs to be taken seriously but it should not result in ‘throwing the baby out with the bath water’.

35. As indicated basing the law primarily on the formulation in paragraph 54(h) of the Walter’s judgment involves an expansion of police powers to use deadly force. As we have argued it is inappropriate to expand police powers to use deadly force in the present circumstances where such uses of force are already at high levels.

36. As argued above it is of primary importance that the ethical basis for Section 49 should be readily apparent. This applies to the 'dangerousness' or 'protection of life' principle but does not apply to the formulation referred to in paragraph 54(h) which is encapsulated in the Bill. This formulation was put forward in *Tennessee v Garner* as a test of dangerousness. This formulation may better be seen as a 'rule of thumb' rather than a rigorous test so that there may be situations where deadly force is used in terms of this test, where the person in reality does not present such a 'future danger'. The principle which applies in our law is that a person is presumed innocent until proved guilty. It is therefore not apparent why it should be justified to shoot at and potentially kill a person on the basis solely of a crime which they are suspected of having committed. This principle is therefore confusing in terms of its ethical basis particularly considering that in some cases police may wrongly suspect people of having committed crimes and therefore kill people in error when they would be released by a court.

37. Alongside these objections it also needs to be acknowledged that the choice is not simply between the current legal provisions and that in the Bill. A third alternative is to make use of wording which is significantly clearer than that in the current Act but which nevertheless articulates a 'dangerousness principle'. Examples of such formulations can be found in the Canadian Criminal Code<sup>18</sup>, the LAPD deadly force policy<sup>19</sup>, and the recommendations of the Police Assessment Resource Centre to the Portland Police Department.<sup>20</sup>

38. This submission however goes further than these provisions in providing guidelines for when a person may be regarded as presenting a danger to others. This is necessary in part in order to prevent police management from having to impose an excessively restrictive interpretation on these

legal provisions to protect police from the risk of being found to have violated the law.

### **Proposal 1: Strengthening the bill to incorporate protection of life principle**

39. Subsection 49(2)(b) of the bill should be amended to provide that:

*The arrestor may use deadly force only if s/he has reasonable grounds to believe that:*

- i. The suspect has committed a crime involving the infliction or threatened infliction of serious bodily harm; and*
- ii. The suspect is likely to inflict serious bodily harm in the future if not apprehended; and*
- iii. There are no other reasonable means of effecting the arrest, whether at that time or later; and*
- iv. The use of deadly force will not endanger innocent bystanders.*
- v. For the purpose of section 49(2)(b)(ii) persons may be regarded as likely to inflict serious bodily harm in the future if the suspect is reasonably believed to have committed:*
  - 1. Multiple acts of this kind; or*
  - 2. Aggravated robbery with a weapon capable of inflicting serious injury; or*
  - 3. Rape involving the infliction or threatened infliction of injury with a weapon capable of inflicting serious injury; or*
  - 4. On other reasonable grounds.*

40. The proposed wording (notably that in sub-clauses (i) and (iii) is based on the wording contained in the Amendment Bill with the following additions:

- a. Sub-clauses (ii) makes the use of force conditional on the dangerousness of the suspect and therefore entrenches a 'protection of life principle' within the provision.
- b. Sub-clause (iv) emphasises the safety of bystanders and therefore further emphasises a protection of life principle.
- c. Sub-clause (v) is intended to address concerns that a dangerousness principle on its own does not provide police with sufficient clarity on when they may or may not use lethal force for arrest.

41. In relation to sub clause (v) it may be noted that:

- a. A fleeing suspect may be someone who is known to the police or someone who is not known.
- b. Where someone is known to the police it may be assumed that as a general rule the police will be able to trace the person at a later stage and that it is therefore not necessary to use deadly force to prevent their flight unless there are reasonable grounds to believe that it will not be possible to trace them or that they will harm someone prior to being traced. However if the person is known to have been involved in repeated acts of serious violence, and if the police cannot reasonably expect to trace him or her then it may be reasonable to use deadly force to prevent his or flight.
- c. In some cases the police are unable to apprehend fleeing suspects whose identities are not known to them and where there may be substantial difficulty in establishing their identity using forensic methods. Sub-clauses (2) or (3) are meant to cover two types of crimes which tend to be committed by 'strangers' (whose identity is not known to the victim) and which tend to be associated with repeat offending.

- d. The reference to 'a weapon capable of inflicting serious injury' would exclude situations where the perpetrator is known to have used a toy gun.
- e. The list provided by points 1, 2 and 3 is not intended as comprehensive. Point 4 would allow for lethal force to be used in other circumstances where reasonable grounds are present for believing the person to present a danger of serious harm to others.

### **Proposal 2: Restrict civilian power to use deadly force**

42. The definition of arrestor in Section 49(1)(a) of the draft bill should be changed to restrict the use of deadly force for arrest to 'peace officers' including police and correctional officials. The restriction would also not prevent police reservists from using deadly force so the number of people able to use deadly force for arrest would not be limited to permanent 'peace officers'. This would mean that civilians (including private security guards) are only authorised to use deadly force for defence. Though we acknowledge that there are shortcomings in policing in South Africa we do not think that we should seek to compensate for this by providing civilians with the authority to use deadly force for arrest. Civilians are not trained in the same way that police are and there is an even higher probability of them acting in error. The international norm is that powers to use lethal force for arrest are restricted to police and other state officials.

### **Proposal 3: Additional measures to support professional use of force by police**

43. As indicated above (paragraph 20 on page 12) 'the types of measures which are most likely to assist with improving police safety are measures which improve the overall professionalism of police in using force. In the US these types of measures have contributed to reductions in killings both of police and by police. Measures which need to be taken to

improve the professionalism of police in South Africa in the use of force include:

- a. **Proper monitoring of the use of force** – the SAPS and other police agencies in South Africa do not actively monitor the use of deadly or other force by their members. In order to be able to engage with police members about the use of force the first step that needs to be taken is that the use of force needs to be properly monitored. **Parliament should request that police establish systems for monitoring the use of force.**
- b. **Development of a use of force policy** – police departments in countries such as the USA and Australia have ‘use of policies’ which they use to provide guidance to their members around questions of the use of force. Currently the directives provided to members of the police other than in training primarily take the form of directives to adhere to the law or rhetorical statements that they should for instance ‘shoot first’. These are entirely inadequate and do not meet the needs of police for proper guidance around the use of force. **Parliament should request that police in South Africa have use of force policies which provide guidance to their members on the use of force.**
- c. Improving support to police officers in relation to their use of force – Currently police in South Africa do receive training on the use of force as part of their training curriculum. However once they leave the training college there is little engagement with them around the use of force. Police departments which properly support professional use of force by their members ensure that station commanders and other members of the chain of command engage with members about the use of force on an ongoing basis. **Parliament should request that the SAPS and metro police agencies review and upgrade their current approaches to**

**providing support to their members to ensure professional use of force.**

44. One of the factors which adds to the difficulty and dangerousness of policing in South Africa is the level of violence in South African society. It is unrealistic to expect policing in South Africa to be carried out properly in this kind of environment without focused attention on the use of force. The amendment of Section 49 on its own will not significantly assist police members in working in this environment. In combination with the strengthening of Section 49 the measures outlined above will support professional policing including greater safety of police and members of the public.
45. Alongside these measures it is necessary to continue to improve the resourcing and other support provided to the Independent Complaints Directorate (Independent Police Investigative Directorate) in order to strengthen accountability of police for the use of force and to ensure proper investigation of cases where police violate the law.

### **Concluding remarks – improving policing in South Africa**

46. The key measures that will support the effectiveness of the police in South Africa are measures which will enhance public cooperation with police. Essentially this means that there needs to be a focus on developing public respect for the police as respect will lead to cooperation. Measures which will improve respect for police are of two kinds:
- a. **Respectful policing** – where members of the police engage with members of the public in a respectful way this builds public trust in the police.
  - b. **Professionalism** – members of the public need to have confidence that police adhere to and aspire to high standards in their work.

47. Professional use of force by police is not only by definition a component of professional policing but a necessary component of respectful policing. An emphasis on professional use of force is therefore necessary not only because it will improve the safety of police and the public but also because it will contribute to greater public respect for the police and hence greater public cooperation and greater police effectiveness.

48. In combination with other measures, clearly articulated legislation that embodies a protection of life principle will assist the police in moving towards a professional orientation to the use of force that is based on high ethical principles. On the other hand this objective will be compromised by merely expanding police powers to use deadly force.

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## Endnotes

<sup>1</sup> Deadly force policy, New York Police Department)

<sup>2</sup> 2002 (4) SA 613 (CC) para. See also the judgment of the Supreme Court of Appeal in the case of *Govender v Minister of Safety and Security* 2001(4) SA 273 (SCA) para 17

<sup>3</sup> [http://www.lapdonline.org/lapd\\_manual/volume\\_1.htm](http://www.lapdonline.org/lapd_manual/volume_1.htm). See also Section 25(4) of the Canadian Criminal Code at <http://laws-lois.justice.gc.ca/eng/acts/C-46/page-7.html#h-6>

<sup>4</sup> Based on Police Assessment Resource Centre 2003 recommendation to Portland Police Bureau)

<sup>5</sup> Olga Kekana was shot and killed in the early hours of the morning after police suspected she and her companions were hijackers. Her friends, Sophie Kgarake and Andrew Singo were shot in the abdomen and the right hand and thigh respectively. Police were apparently looking for a vehicle which had been hijacked earlier and mistakenly identified the vehicle occupied by Kekana and her companions as the vehicle in question. The driver of the vehicle, an air force pilot, said that he was driving through a traffic circle when the shooting happened. He saw a blue light behind the vehicle and ‘the next moment’ the police started shooting at the vehicle. After realizing that they had shot the wrong people the police officers involved allegedly fled from the scene. (‘Shoot to kill’ cops under fire, *Star* 12 October 2009.)

<sup>6</sup> Three year old Atlegang Phalane was shot dead by a police officer whilst sitting in the back of his uncle’s car outside a relative’s house. Police were apparently looking for the boy’s father and another man in connection with various cases of murder and robbery. The police officer involved in the shooting allegedly fired into the car after rapidly approaching the car and seeing what he thought was a firearm in the car though no gun was found in the car.<sup>6</sup> A police officer was subsequently charged with murder in this case. Cop shoots 3-year-old – shoot-to-kill instructions again in spotlight after killing. *The Star*, 10 November 2009; ‘Criminal when cops shoot a child’. *The Star*, 11 November 2009; Shot toddler’s dad arrested – father found in

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possession of unlicensed firearm. <http://www.sowetan.co.za/News/Article.aspx?id=1094293> (accessed 16 April 2010).

<sup>7</sup> Police searching for an escaped prisoner, Sibusiso Thili Mzimela escaper stormed into a house and shot a 15 year-old schoolboy, Kwazi Ndlovu, near Empangeni in KwaZulu-Natal. The boy's father, Subusiso Ndlovu, said that after the shooting he was dragged from the passage of his house by the police and not allowed to look at the couch where his son had been sleeping. Police then drove around with him for 45 minutes, while other officers stayed with his wife and his sons. 'The policeman who was driving kept on asking me who was that on the couch and, when I told him it was my son, his eyes became wet and he rubbed his face,' he said. When the police finally took him home, he asked them where his son was and they told him that he was being questioned by police. 'My wife, who had been told to wait outside, ran through the police tape and told me that she had seen our son's body lying on a couch and next to him there was a gun,' he said. Ndlovu said his son did not own a gun. (Distraught father wants justice - Police shot my sleeping son, 15, Mercury 2 April 2010.)

<sup>8</sup> The previous highest figure was 501 in the 1998/99 year.

<sup>9</sup> The issue of killings of bystanders should also be examined in relation to people killed by police or other vehicles during vehicle pursuits involving police.

<sup>10</sup> See for instance A Faull (2010) Behind the Badge. P. 105

<sup>11</sup> The commentary on Article 3 of the Code states: The use of firearms is considered an extreme measure. Every effort should be made to exclude the use of firearms, especially against children. In general, firearms should not be used except when a suspected offender offers armed resistance or otherwise jeopardises the lives of others and less extreme measures are not sufficient to restrain or apprehend the suspected offender.

<sup>12</sup> Principle 9 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (the Basic Principles) provides as follows: Law enforcement officials shall not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, to prevent the perpetration of a particularly serious crime involving grave threat to life, to arrest a person presenting such a danger and resisting their authority, or to prevent his or her escape, and only when less extreme means are insufficient to achieve these objectives. In any event, intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life.

<sup>13</sup> 471(1985) U S 1

<sup>14</sup> 2001(4) SA 273 (SCA) para 17

<sup>15</sup> 2002 (4) SA 613 (CC) para

<sup>16</sup> Levi, M. and Maguire, M. (2002). "Violent crime". In Maguire, M., Morgan, R., and Reiner, R. (Eds). *The Oxford Handbook of Criminology* (3<sup>rd</sup> Edition). Oxford University Press: Oxford.

<sup>17</sup> See for example presentation of Major General Tertius Geldenhuys at conference of the Institute for Security Studies on Policing in South Africa, 30 September 2010.

<http://www.issafrica.org/uploads/PolicinginSA2010.pdf>

<sup>18</sup> Footnote 3 above.

<sup>19</sup> Footnote 3 above.

<sup>20</sup> Police officers may only use deadly force to stop a fleeing suspect if they have reasonable grounds to believe that the suspect (1) has committed an offense involving the actual or threatened infliction of serious physical injury or death, and (2) is likely to endanger human life or cause serious injury to another unless apprehended without delay. Based on Police Assessment Resource Centre 2003 recommendation to Portland Police Bureau)